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Federal Communications Commission
Washington, D.C. 20554

JUL 12 1996

DOCKET FILE COPY ORIGINAL

The Honorable Kay Bailey Hutchison
United States Senator
10440 North Central Expressway, Suite 1160
LB 606
Dallas, Texas 75231

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JUL 18 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Senator Hutchison:

Thank you for your letter of June 14, 1996, on behalf of your constituent, Benjamin L. Scott, regarding the Commission's microwave relocation proceeding, WT Docket No. 95-157. Mr. Scott expresses concern regarding the behavior of some incumbents in the 2 GHz band during the voluntary negotiation period that is now underway for the PCS "A" and "B" blocks. Mr. Scott suggests that the Commission impose an obligation on the parties to negotiate in good faith during this period.

Our existing microwave relocation rules provide that during the voluntary negotiation period, parties are encouraged but not required to negotiate the terms of relocation. Following the expiration of this fixed period PCS licensees may initiate a one-year mandatory negotiation period, during which time the parties are required to negotiate in good faith. After the expiration of the mandatory negotiation period, involuntary relocation may be sought by the PCS licensee, provided such licensee pays the costs of relocating the incumbent to comparable facilities.

The Commission adopted this framework in 1993 after receiving extensive input from all interested parties and from a number of interested members of Congress. The framework was designed to balance carefully the needs of PCS licensees for early access to spectrum with those of microwave incumbents for a smooth and seamless transition to new facilities in higher spectrum bands. We concluded that a process that relied primarily on voluntary negotiations would provide the best balance between ensuring orderly and fair relocation of incumbents and the national interest of facilitating the development of new technologies and services.

In WT Docket No. 95-157, the Commission considered whether to make certain modifications and clarifications to the microwave relocation rules. The record in this proceeding shows that in the vast majority of cases PCS licensees and incumbents are successfully negotiating fair and equitable relocation agreements. There is, however, evidence that in a small number of cases, incumbents have declined to negotiate during the voluntary negotiation period or have demanded premiums substantially in excess of the cost of relocation.

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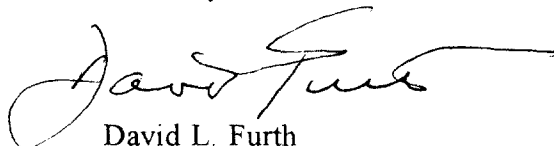
On April 25, 1996, the Commission adopted a *Report and Order and Further Notice of Proposed Rule Making* in the microwave relocation docket. The amendments and rule clarifications adopted in the *Report and Order* are designed to add certainty to the relocation process and encourage early, efficient, and equitable relocation of incumbent licensees. Attached for your convenience is a copy of the press release summarizing the decisions made. The Commission took a number of significant steps to encourage voluntary relocation, including:

- Adoption of a cost-sharing plan to encourage system-wide relocation of incumbents.
- Requiring incumbents to provide access to their facilities during the voluntary period to facilitate independent estimates of relocation costs.
- Clarifying that incumbents who do not enter into relocation agreements during the voluntary or mandatory negotiation periods are only entitled to replacement of interfering links with comparable facilities, not to equipment upgrades or full-system replacement.

The *Report and Order* does not, however, change the voluntary nature of the initial negotiation period. Although some commenters did suggest such an approach, the Commission was concerned about fundamentally altering the relocation rules upon which both sides had relied in entering into negotiations. The PCS "A" and "B" block licensees were on notice of the existing rules when they commenced bidding for their licenses, and therefore were fully capable of factoring in the potential cost of relocation under the rules into their bidding. To change our rules governing voluntary negotiations while such negotiations are ongoing could in fact undermine negotiations and lead to future uncertainty about the consistent application of the Commission's rules. The Commission did, however, seek comment on whether the voluntary and mandatory negotiation periods should be modified for PCS licensees and incumbents who have not yet commenced voluntary negotiations. While I cannot prejudge the Commission's final decision on this alternative, I can assure you that we will carefully consider the views stated in your constituent's letter in reaching our conclusions.

Thank you for your inquiry.

Sincerely,



David L. Furth
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

Enclosure

KAY BAILEY HUTCHISON
TEXAS

United States Senate

WASHINGTON, DC 20510-4304

June 14, 1996

COMMITTEES:
ARMED SERVICES
SMALL BUSINESS
COMMERCE, SCIENCE,
AND TRANSPORTATION
SELECT INTELLIGENCE

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auction
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RESPECTFULLY REFERRED TO:

Director, Legislative Affairs
Federal Communications Commission
Room 857, 1919 M. Street, N.W.
Washington, D.C. 20554

Dear Sir/Madam:

The attached communication was forwarded to Senator Hutchison by a constituent who is concerned about a matter that falls within your agency's jurisdiction. I would appreciate it if appropriate inquiries could be initiated on this individual's behalf, and if a full response could be prepared for me to report to the constituent.

It would be very helpful if the attached were to accompany your response. In the event you require more information, please do not hesitate to contact me in Dallas at (214)361-3500.

Thank you for your courtesy.

PLEASE REPLY TO:

Office of Senator Kay Bailey Hutchison
Attention: Mary Fae Kamm
10440 North Central Expressway, Suite 1160
LB 606
Dallas, Texas 75231

Enclosure

PrimeCo Personal Communications, L.P.

6 Campus Circle

Westlake, Texas 76262

(817)258-1110 Fax: (817)258-1107

Benjamin L. Scott
President & CEO

Buck to
FCC

April 12, 1996

Senator Kay Bailey Hutchinson
283 Russell State Building
Washington, D.C. 20510

Dear Senator Kay Bailey Hutchinson:

PrimeCo Personal Communications is a licensed provider of personal communications services in Texas. Our PCS services are currently being built out and deployed, with service expected to be turned on in 1996, if all goes well. In that regard, we are encountering a growing problem with certain aspects of our deployment plans which I would appreciate your help in addressing.

Before we can turn on this new PCS technology to provide an array of new, competitive wireless services to the citizens of Texas, we have to relocate numerous microwave incumbents out of the spectrum we will use. These incumbents are utilities, rails, public safety entities and the like, who were previously assigned use of the spectrum for non-commercial purposes.

Some, but not all, of the microwave links they use may cause interference with our PCS systems, and the FCC has adopted rules that must be followed for purposes of negotiating the relocation of the interfering links. Therein lies the problem, as a small minority of these incumbents threaten to delay our deployment in key markets unless we comply with extremely unreasonable and unsubstantiated demands for exorbitant payments to these incumbents.

The rules adopted by the Commission provide an initial "voluntary" period of up to three years during which there are no good faith obligations imposed on parties to negotiations. Good faith only begins to apply during the so-called mandatory period, which begins to run only after the voluntary period has expired.

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Because they don't have to negotiate in good faith for several years, some incumbents have begun to "game" the rules by making exorbitant and unreasonable demands on the new PCS licensees, totally unrelated to actual costs of relocation or relevant needs of the incumbents, or they simply refuse to negotiate at all.

The new PCS licensee has the choice of paying these unreasonable demands, or waiting for the expiration of the voluntary period so that good faith can be required. Either way, these unwarranted delays and exorbitant demands directly stall buildout to urban and rural markets, devalue spectrum yet to be auctioned, and negatively impact the consumer benefits that would otherwise be available from timely deployment of new competitive services.

Senator Kay Bailey Hutchinson, this is not what Congress intended when it authorized spectrum auctions. Nor were the rules adopted by the FCC intended or anticipated to be used by incumbents for unjust and unsubstantiated enrichment, to the detriment of consumers and the U.S. Treasury.


On March 27, as part of the Senate Commerce Committee hearing on spectrum policies, the wireless industry presented testimony on this issue. I have enclosed a summary of the testimony presented by Tom Wheeler of CTIA.

It seems not only reasonable, but good policy, for the FCC to impose an obligation of enforceable good faith during all relocation negotiation periods. An opportunity exists now, in a pending rulemaking before the Commission, Dkt. No. 95-157, for this matter to be redressed.

We would appreciate it if you would join with your colleagues on the Senate Commerce Committee in signing a letter to Chairman Hundt at the Commission, (copy attached), letting him know that you feel good faith is good policy for all relocation negotiations.

Thank you for your interest. Please do not hesitate to contact me if I can provide you with additional information.

Very truly yours,


Benjamin L. Scott
President & CEO

BLS/cn

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Dear Chairman Hundt:

We urge you to consider, in the context of the Commission's NPRM, WT Docket No. 95-157, RM 8642, further remedial action affecting the relocation of microwave incumbents in the 2 GHz band. Specifically, we urge you to consider imposing enforceable good faith negotiating obligations on all parties to all relocation negotiations, now and in the future.

This issue was raised in a colloquy between members of the Senate Commerce Committee in September of 1995. At that time we urged the parties to such negotiations to attempt to resolve amicably the perceived problem whereby some incumbents appeared to be gaming the current relocation rules to the detriment of emerging technology licensees and possibly the American taxpayer.

It appears from information which both we and you have received since that colloquy occurred, that some incumbents continue to try to leverage their incumbency into exorbitantly expensive windfalls for themselves, or simply are refusing to negotiate during the so-called voluntary periods unless an emerging licensee agrees to their demands.

The pending NPRM seeks to redress some of the hardships and ambiguity unintentionally imposed by the current rules and the unanticipated gamesmanship by some of the parties to relocation negotiations. We believe that adding an explicit good faith obligation on all parties during any relocation negotiations is both equitable and sound policy. Moreover, it should be enforceable against violators by termination of voluntary negotiations, relocation cost allocation, or other effective measures.

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Such action by the Commission now will establish the minimum ground-rules needed to ensure that current and future negotiations proceed without unnecessary cost or delay, as was originally intended by Congress and the Commission.

Thank you for your attention to this matter. We look forward to hearing from you.

Sincerely,



Summary of Testimony by Thomas E. Wheeler

In 1993, Congress recognized the positive impact of wireless communications for all Americans and gave the FCC authority to auction spectrum for the provision of personal communications services (PCS), with a goal of expanding competition and consumer choice in wireless communications.

The results of those auctions have astounded all observers. To date, bids and other payments for PCS licensees exceed \$15 billion dollars, with no end in sight. However, this bright beginning for the next generation of wireless services is rapidly being clouded by the irresponsible behavior of some incumbent microwave licensees who are violating their public trust and delaying the provision of new wireless services for their private gain. PCS firms who paid billions at auction now may be forced to wait from five to seven years, or longer, before being able to begin serving their customers in some markets. These unwarranted delays directly stall buildout to rural markets, devalue spectrum yet to be auctioned, and negatively impact the consumer benefits that otherwise would be available from timely deployment of new competitive services.

The types of delays and unreasonable demands being encountered include: incumbents demanding relocation of non-interfering links; incumbents demanding exorbitant premiums if they agree to terms for relocation during the "voluntary" period; incumbents demanding unsubstantiated payments of 5-6 times the actual cost of relocation per link; incumbents which have already been relocated demanding a premium to release their old spectrum to the PCS licensee.

Because the current rules permit this type of unreasonable behavior, the exorbitant demands are expected to continue and to spread as more licenses are auctioned and licensees try to get their systems timely deployed. This will induce prospective bidders to reserve a substantial portion of their investment capital in anticipation of paying the excessive demands of the microwave incumbents. As a result, the maximum amount a company may bid at the spectrum auctions is repressed, and funds that should flow to the U.S. Treasury instead flows into the pockets of microwave incumbents.

Improving the microwave relocation process will benefit consumers. It will allow new PCS providers to use the money that would otherwise be applied to pay these exorbitant relocation demands of microwave incumbents, or to service their debt as they wait for good faith obligations to apply under the rules, for capital investments in their networks. This means more competition, faster, with lower prices and greater choice.

In order to get PCS system deployment on track, CTIA and the wireless industry have filed comments requesting that the FCC impose enforceable "good faith" obligations during all relocation negotiations, establish further incentives for concluding voluntary negotiations successfully, and penalties for failure to negotiate in good faith, including termination of voluntary negotiations and limitations on costs.